STATE OF MICHIGAN

COURT OF APPEALS

MERCER N. SMITH,

Plaintiff-Appellee/Cross-Appellant,

v

ALEXANDRA E. ELY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 29, 2004

No. 241587
Oakland Circuit Court
LC No. 00-028364-CZ

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross appeals from the trial court's judgment declaring plaintiff the sole owner of certain investment assets. We affirm.

Plaintiff, a retired school teacher, executed a durable power of attorney in 1998, giving defendant, plaintiff's stepdaughter, authority to manage and conduct plaintiff's affairs. At that time, defendant already had access to plaintiff's funds in certain bank accounts with Bank One, having been added to those accounts in 1996.

The durable power of attorney was still in effect on February 17, 2000, when plaintiff and defendant executed a change of ownership form for plaintiff's investment account with the AARP Investment Program from Scudder, a brokerage company (hereafter referred to as the "Scudder" asset). Unlike a joint bank account, the Scudder asset could not be accessed without signatures from both owners. In March 2000, defendant withdrew $130,000 from one of plaintiff's bank accounts and deposited it in the Scudder account. On May 4, 2000, defendant withdrew $37,000 from a bank account and deposited it in a joint investment account that defendant established with Fidelity Investments (hereafter referred to as the "Fidelity" asset). The Fidelity account had the same restrictive signature requirements as the Scudder account. Subsequently, in a letter dated May 9, 2000, plaintiff requested that Scudder ignore defendant because she owned the Scudder account.

The parties' relationship deteriorated in 2000, when defendant filed a petition with the Oakland County Probate Court requesting that she be appointed plaintiff's guardian or the conservator of plaintiff's estate on the ground that plaintiff had mental and physical deficiencies, and plaintiff filed her own petition seeking the appointment of a conservator on the ground that she was mentally competent, but needed help managing her income and assets. While

proceedings were pending in the probate court, plaintiff filed the instant action against defendant in the Oakland Circuit Court, seeking monetary damages or equitable relief with regard to the investment assets based on allegations that defendant had breached fiduciary duties arising from the durable power of attorney, fraudulently procured the February 17, 2000, change of ownership form for the Scudder asset, and unjust enrichment.

The trial in the probate court concluded before the circuit court action came to trial. The probate court dismissed defendant's petition to be appointed plaintiff's guardian, but granted plaintiff's request for a conservator pursuant to an order specifying that plaintiff was "mentally competent but due to age or physical infirmity is unable to manage his or her property or affairs effectively and, recognizing this disability, has requested a conservator's appointment."

At the trial in the circuit court, defendant claimed that plaintiff added her to the Scudder account as a gift, to become effective upon plaintiff's death pursuant to a right of survivorship. The jury rejected this claim, finding that the joint ownership of the Scudder asset was a result of defendant's breach of fiduciary duty and silent fraud and resulted in defendant's unjust enrichment. Although the jury determined that plaintiff was entitled to both compensatory and exemplary damages, the trial court, upon determining that plaintiff was electing equitable relief, rendered its own findings and granted equitable relief in the form of cancellation and rescission, such that the parties were restored to their positions before February 17, 2000, thus rendering plaintiff the sole owner of the investment assets.

On appeal, defendant first argues that the trial court lacked subject matter jurisdiction to determine the "title" to the assets that were the subject of the conservatorship. Defendant raised this issue in a pretrial motion for summary disposition under MCR 2.116(C)(4), which the trial court denied. We review the trial court's decision de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). Subject matter jurisdiction is the right of a court to exercise judicial power over a class of cases, not the particular case before it. *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998).

Upon de novo review, we conclude that the trial court correctly denied defendant's motion. The probate court did not have exclusive jurisdiction to decide plaintiff's claims for monetary damages or equitable relief. MCL 600.605. Although the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, establishes exclusive jurisdiction in the probate court for conservatorships, a "conservator" is a "person appointed by a court to manage a protected individual's estate" MCL 700.1103(h). A probate court may appoint a conservator to manage a person's property and affairs if certain statutory conditions are satisfied. MCL 700.5401. Plaintiff's causes of action in the circuit court did not involve a conservatorship within the meaning of the EPIC, because it did not concern the management of her property and affairs. Hence, the circuit court did not lack judicial power to decide plaintiff's claims.

We note that defendant's alternative claim that the probate court had concurrent jurisdiction was accepted by the trial court. But on de novo review, defendant has not shown any statutory or other basis for disturbing the circuit court's determination that it was not precluded from exercising jurisdiction. MCL 700.1303 does not mandate that the probate court decide a matter in cases of concurrent jurisdiction. Substantively, defendant has presented only a question as to whether the circuit court erred in denying summary disposition pursuant to MCR 2.116(C)(6) ("[a]nother action has been initiated between the same parties involving the same

claim"). *J D Candler Roofing Co, Inc v Dickson,* 149 Mich App 593, 598; 386 NW2d 605 (1986).

In considering whether the "same claim" was involved in both the probate court and circuit court, we reject defendant's overly broad characterization of plaintiff's cause of action as a "title" dispute. Although the circuit court made the same mistake, it reached the right result in denying defendant's motion for summary disposition. "[M]ore than one person can have an interest in property and that interest can take on different forms, i.e., legal title or even equitable title." *In re Forfeiture of $53,* 178 Mich App 480, 493; 444 NW2d 182 (1989). In an ordinary title dispute, parties are called upon to present evidence of title and the superior nature of the right to title. See *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999) (discussing an action to quiet title in real estate). In the case at bar, the evidence presented to the circuit court for purposes of deciding defendant's motion for summary disposition did not reflect any dispute concerning the legal title to plaintiff's investment assets in either the probate court or circuit court.

With regard to the probate court proceeding, the issues concerned whether plaintiff was competent to handle her own affairs and whether appointment of a conservator was necessary. The special conservator had a statutory duty to prepare an inventory of plaintiff's "estate" while the proceedings were pending. See MCL 700.5417. An "estate" is defined to include "the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration." MCL 700.1104(b). "Property" means "anything that might be subject to ownership, and includes both real and personal property or an interest in real or personal property." MCL 700.1106(q).

The mere fact that the special conservator noted on the inventory that there was an "ownership" dispute with regard to plaintiff's joint investment assets did not constitute evidence that a "title" dispute, legal or equitable, was being litigated in the probate court. One could reasonably infer from the inventory a recognition that legal title rested with both plaintiff and defendant as joint owners, but that plaintiff might be claiming some other right, such as one that could be provided in equity, to reach the funds as the sole owner. However, the mere fact that an estate was involved did not necessarily vest jurisdiction in the probate court to decide this issue. *Sumpter v Kosinski,* 165 Mich App 784, 798; 419 NW2d 463 (1988).

Similarly, the litigation in the circuit court, while characterized as a "title" dispute by the court, was pursued with the underlying premise that the disputed assets were jointly owned by both plaintiff and defendant. Indeed, with regard to plaintiff's request for relief in the form of compensatory (monetary) damages, that legal title would have remained unaffected. The alternative equitable relief sought by plaintiff did not, in substance, stem from a "title" dispute, but rather sought to invoke the court's equitable power to reach beyond a wrongdoer's legal title to remedy a wrong. *Brusco v Pinquet,* 321 Mich 630, 639; 33 NW2d 100 (1948). The specific relief of rescission or cancellation sought by plaintiff with regard to the February 17, 2000, change of ownership form for the Scudder asset likewise constitutes an equitable remedy. See *Lenawee Co Bd of Health v Messerly,* 417 Mich 17, 31; 331 NW2d 203 (1982), and *ECCO, Ltd v Balimoy Mfg Co,* 179 Mich App 748, 750; 446 NW2d 546 (1989). The effect of a rescission is to restore parties to their status quo before the transaction. *Lash v Allstate,* 210 Mich App 98, 102; 532 NW2d 869 (1995).

Thus, the circuit court litigation involved the potential of enhancing plaintiff's estate through an award of monetary damages or, conversely, through a court of equity abrogating defendant's legal title as a joint owner, but it was not, in substance, a "title" dispute. For this reason, and considering that the probate court proceeding did not involve an action "initiated between the same parties involving the same claim," the trial court correctly denied defendant's motion for summary disposition. MCR 2.116(C)(6). We find defendant's reliance on *In re Cain Estate*, 147 Mich App 615; 382 NW2d 829 (1985), to be misplaced because, unlike the instant case, the probate court in *In re Cain Estate*, addressed the same claim that was presented to the circuit court.

Next, we turn to defendant's claim that the trial court erred by allowing plaintiff, rather than her special conservator or conservator, to prosecute this civil action. Because defendant does not brief the specific judicial decision that she is challenging, we need not address this claim. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001) (this Court need not address an issue that is given only cursory treatment in an appeal brief), and *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990) (a party may not leave it to this Court to search for a factual basis to sustain or reject a position). In passing, we note that defendant's reliance on MCR 2.201(E) is misplaced because there is no evidence here that plaintiff was ever found mentally incompetent. *Redding v Redding*, 214 Mich App 639, 645-646; 543 NW2d 75 (1995). To the contrary, the record reflects that the probate court found plaintiff mentally competent before plaintiff's trial in the case at bar. We decline to address defendant's additional claim that the real parties in interest were step-relatives, given defendant's failure to set forth this claim in her statement of questions presented. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

Defendant next argues that the trial court erred by allowing evidence of statements, events, and circumstances occurring after February 17, 2000, the date the change of ownership form was executed for the Scudder asset. We have considered defendant's claim in the context of her general objection in the trial court to the relevancy of post-February 17, 2000, evidence. We are not persuaded that the trial court abused its discretion in allowing this evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Contrary to defendant's claim on appeal, the record does not reflect that the sole issue relevant to plaintiff's claims was whether plaintiff intended a gift on February 17, 2000, when signing the change of ownership form for the Scudder asset. The fact that plaintiff sought relief in connection with other financial transactions, including defendant's transfer of $37,000 from the Bank One account to the Fidelity account in May 2000, belies any claim that post-February 17, 2000, evidence was not relevant. MRE 401. The fact that defendant took a position at trial that the February 17, 2000, transaction involved a gift did not preclude plaintiff from presenting evidence probative of other issues, such as credibility or defendant's intent. Evidence regarding a general scheme to defraud has long been recognized as probative evidence of the alleged wrongdoer's intent. See *Yanelli v Littlejohn*, 172 Mich 91; 137 NW 723 (1912). Accordingly, we reject defendant's general challenge to the trial court's ruling to allow post-February 17, 2000, evidence. Defendant has not shown that the trial court abused its discretion.

Defendant's additional claim that the evidence should have been excluded under MRE 403 likewise affords no basis for relief. Defendant has failed to show plain error affecting her

substantial rights in this regard. MRE 103(d); *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997).

We note that whether evidence concerning a particular statement, event, or circumstance occurring after February 17, 2000, should nonetheless have been excluded under the rules proscribing hearsay, because it lacked probative value to a fact of consequence to the determination of the action, or the probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to MRE 403, present distinct questions. To properly preserve such challenges to the post-February 17, 2000, evidence, defendant was required to specifically object on these same grounds at trial. MRE 103(a)(1); *Wischmeyer v Schanz*, 449 Mich 469, 483; 536 NW2d 760 (1995). See also *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995) (there may be more than one bar to the admission of evidence). It is well settled that the admissibility of evidence depends on the purpose for which it is offered. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Limiting our review to defendant's general challenge to the relevancy of post-February 17, 2000, statements, events, and circumstances, we find no error.

Finally, we turn to defendant's challenges to the trial court's factual findings regarding plaintiff's causes of action for breach of fiduciary duty, silent fraud, and unjust enrichment. Because defendant has insufficiently briefed this issue by failing to relate the challenged findings to the specific legal claims in question, or provide citations to supporting authority with regard to these claims, we need not consider this issue. *Eldred, supra* at 150.

In any event, we are not persuaded that a basis for appellate relief has been shown. "This Court reviews equitable actions under a de novo standard. We review for clear error the findings of fact supporting the decision." *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). In the application of the clearly erroneous standard, this Court gives regard to the special opportunity of the trial court to judge the credibility of witnesses who appeared before it. MCR 2.613(C). Even if a trial court erred, its verdict will not be set aside unless it appears that refusal to take this action would be inconsistent with substantial justice. MCR 2.613(A); *In re Approximately Forty Acres in Tallmadge Twp*, 223 Mich App 454, 463; 566 NW2d 652 (1997).

Having considered defendant's challenges to specific factual findings made by the circuit court, we conclude that the court's findings were either not clearly erroneous or constituted harmless error. MCR 2.613(A). In particular, defendant has not established any basis for disturbing the circuit court's finding that she stood in a fiduciary relationship with plaintiff at the time of the relevant financial transactions, given the durable power of attorney previously executed by plaintiff. "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999). Nor has defendant established any basis for disturbing the circuit court's finding that she failed to prove a "gift" in relation to the February 17, 2000, transaction. When a fiduciary is a donee, the fiduciary has the burden of proving the validity of the gift. *LaForest v Black*, 373 Mich 86, 92; 128 NW2d 535 (1964). "The presumption is against the propriety of the transaction, and . . . the duty of courts is to refuse judicial sanction to such an instrument until fully satisfied of the fairness of the transaction, and that the instrument is the intelligent act of the person executing it." *Smith v Cuddy*, 96 Mich 562, 569; 56 NW 89 (1893).

Although we agree with defendant that the evidence did not reflect that she executed the February 17, 2000, change of ownership form by signing it in her capacity as plaintiff's attorney in fact, examining the circuit court's findings in context, it is apparent that the court was not concerned with the manner in which the document was signed, but with defendant's fiduciary relationship with plaintiff when procuring the change of ownership form, and defendant's failure to disclose the consequences of the change of ownership, particularly that plaintiff would lose independent control over the asset as a result of the dual signature requirement. Defendant has not presented any basis for disturbing the circuit court's finding that she breached her fiduciary duties owed to plaintiff relative to the financial transactions upon which plaintiff was granted equitable relief. *Teadt, supra*. Further, defendant has not established any basis for disturbing the circuit court's determination that equitable relief was also supported by plaintiff's claims for silent fraud and unjust enrichment. *M & D, Inc v McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). See also *Brusco, supra* at 639; *ECCO, supra*.

With regard to plaintiff's issues on cross appeal, we are not persuaded that the circuit court erred by refusing to award plaintiff exemplary damages. The purpose of exemplary damages is not to punish a defendant, but rather to render a plaintiff whole by compensating for a mental injury in a limited class of cases in which the mental injury was the result of outrageous conduct. *Gilroy v Conway*, 151 Mich App 628, 636; 391 NW2d 419 (1986). Although a court of equity may award exemplary damages, the defendant's conduct must be "malicious or so wilful and wanton as to demonstrate a reckless disregard of [the] plaintiff's rights." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 487-488; 593 NW2d 180 (1999). "The fact that a tort is committed intentionally does not mean that it was committed with malice or reckless disregard of the rights of others, or wantonly, as necessary to permit exemplary damages." *Bailey v Graves*, 411 Mich 510, 515; 309 NW2d 166 (1981).

In the case at bar, the circuit court's equitable relief related only to the financial transactions that caused plaintiff to lose control over the funds that were placed in the Scudder and Fidelity accounts. As a result of the cancellation and rescission relief granted by the circuit court, plaintiff became the sole legal owner of these assets, as well as a Bank One account. The circuit court's decision to deny exemplary relief on the ground that plaintiff did not prove that defendant's conduct was malicious and wilful is not clearly erroneous. MCR 2.613(C). Although the circuit court allowed evidence of other events, such as defendant's conduct in having plaintiff placed at Mercy Bellbrook in May 2000, we are not persuaded that this evidence requires that the circuit court's decision be disturbed.

We also reject plaintiff's claim that the circuit court should have awarded attorney fees as part of its equitable judgment. In this regard, we note that the circuit court's findings were somewhat inconsistent, inasmuch as the court indicated there was insufficient evidence to establish that defendant was guilty of fraudulent conduct, but also found silent fraud. Nevertheless, the circuit court reached the correct result, given the general rule that attorney fees are not recoverable unless provided by a statute, court rule, or common-law exception. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994).

The circuit court's reliance on dicta in *Scott v Hard-Corrigan Moving & Storage Co, Inc*, 103 Mich App 322; 302 NW2d 867 (1981), to find a fraud exception for attorney fees was misplaced, inasmuch as *Scott* did not involve an action for fraud. Moreover, the cases relied on in *Scott* do not establish a "fraud" exception, but rather considered a request for attorney fees

under either an exception for attorney fees in situations where a plaintiff is forced to expend money to prosecute or defend a prior lawsuit because of the defendant's wrongful acts, or as exemplary damages. See *State Farm Mutual Automobile Ins Co v Allen*, 50 Mich App 71; 212 NW2d 821 (1973); *Fleischer v Buccilli*, 13 Mich App 135; 163 NW2d 637 (1968); *Oppenhuizen v Wennersten*, 2 Mich App 288; 139 NW2d 765 (1966). The instant case does not involve attorney fees sought in connection with a prior lawsuit. Further, as discussed previously, Michigan law currently provides for exemplary damages to compensate for mental injury. See also *B & B Investment Group v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998). Accordingly, *Scott* does not provide a basis for an award of attorney fees in this case.

While we nonetheless agree with plaintiff that a court of equity has inherent power to award attorney fees, in the case at bar, plaintiff has failed to show that the court's refusal to award attorney fees was inequitable. *Kennedy v Brady*, 43 Mich App 760; 204 NW2d 779 (1972); see also *Walch v Crandall*, 164 Mich App 181, 193; 416 NW2d 375 (1987).

Finally, we find no basis for plaintiff's claim that the circuit court erred by denying her request to impose an attorney's charging lien on the Scudder and Fidelity assets. An attorney's charging lien "creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services." *George v Sandor M Gelman, PC*, 201 Mich App 474, 476; 506 NW2d 583 (1993). Stated otherwise, Michigan "recognizes a common-law attorney's lien on a judgment or fund resulting from the attorney's services." *Doxtader v Sivertsen*, 183 Mich App 812, 815; 455 NW2d 437 (1990).

Because plaintiff's restoration of sole ownership in the investment assets does not constitute a monetary recovery, and plaintiff has not cited any authority for the proposition that an attorney's charging lien can be imposed on a client's investment assets, we conclude that plaintiff has not established a basis for relief. *Eldred*, *supra* at 150. In passing, even if we were to conclude that a client could consent to an attorney's charging lien by signing her attorney's motion for entry of a charging lien, which was done here, the facts of this case are unique because plaintiff's investment assets are also the subject of a conservatorship in the probate court. As a consequence of the trial court's equitable judgment to disregard defendant's legal title to the assets, plaintiff's legal title to the investment assets was enhanced. But to reach the enhanced investment assets in order to secure payment for attorney fees, plaintiff's attorney must follow the procedures for claims set forth in the EPIC. See MCL 700.5419(3) and MCL 700.5429. Hence, the circuit court did not err by refusing to order an attorney's charging lien.

Affirmed. No costs pursuant to MCR 7.219(A), neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage